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JURISDICTIONAL STATEMENT

Clayton incorporates by reference the Jurisdictional Statement in his original brief.

STATEMENT OF FACTS

Clayton incorporates by reference the Statement of Facts in his original brief.

POINT I

The motion court clearly erred in denying Clayton's post-conviction motion, because the record leaves the firm conviction that a mistake has been made, in that counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise under the same or similar circumstances, in violation of Clayton's rights to due process, effective assistance of counsel, and freedom from cruel and unusual punishment, under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, in that counsel presented inconsistent defense theories: 1) Clayton did not kill Castetter, but Cole was the shooter; and 2) Clayton killed Castetter, but due to a mental defect, Clayton could not deliberate. Clayton was prejudiced, because the weaker not guilty defense compromised the credibility of the diminished capacity defense in the guilt phase and the credibility of the mental defense in the penalty phase. There is a reasonable probability that Clayton would have been convicted of

second-degree murder or at least sentenced to life without parole if counsel had not pursued the inconsistent not guilty defense.

United States v. Jerome, 933 F.Supp. 989 (D.Nev.1996), reversed, 124 F.3d 214 (9th Cir. 1997);

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been convicted of second-degree murder or at least sentenced to life without parole if counsel had presented this evidence.

State v. Hendrix, 883 S.W.2d 935 (Mo. App. 1994);

State v. Rowe, 838 S.W.2d 103 (Mo. App. 1992);

State v. Cone, 3 S.W.3d 833 (Mo. App. 1999);

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ARGUMENT I

The motion court clearly erred in denying Clayton's post-conviction motion, because the record leaves the firm conviction that a mistake has been made, in that counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise under the same or similar circumstances, in violation of Clayton's rights to due process, effective assistance of counsel, and freedom from cruel and unusual punishment, under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, in that counsel presented inconsistent defense theories: 1) Clayton did not kill Castetter, but Cole was the shooter; and 2) Clayton killed Castetter, but due to a mental defect, Clayton could not deliberate. Clayton was prejudiced, because the weaker not guilty defense compromised the credibility of the diminished capacity defense in the guilt phase and the credibility of the mental defense in the penalty phase. There is a reasonable probability that Clayton would have been convicted of second-degree murder or at least sentenced to life without parole if counsel had not pursued the inconsistent not guilty defense.

Counsel presented inconsistent defenses in the guilt phase. Counsel argued that Clayton did not shoot Police Officer Christopher Castetter, but if Clayton did shoot Castetter, then he was not guilty of first-degree murder, because he could not deliberate

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focus on the element of deliberation is not inconsistent with a theory of diminished capacity" (PCRL.F. 133).

Respondent also claims that the defenses are not inconsistent: "As presented to the jury, the two defense theories were not necessarily mutually exclusive. Counsel never conceded to the jury that appellant was the shooter.

Counsel's strategy was to point out inconsistencies in the state's case and argue that the state did not prove he shot the victim beyond a reasonable doubt and also argue that because of appellant's brain damage he was not capable of deliberation" (Resp. Br. at 27-28, emphasis in the original). It is inexplicable that the state now claims the defenses are not mutually exclusive, but at trial the state argued that the defense theories were contradictory, therefore neither should be believed (Tr. 1676-1677).

It is not entirely clear why Respondent and the motion court believe the defenses are not inconsistent. Respondent and the motion court baldly assert that the defenses are compatible without explanation. The motion court and Respondent are simply wrong. Clayton cannot be both innocent and guilty of second-degree murder. The defenses are mutually exclusive.

A tenable diminished capacity defense could not be set forth without conceding that Clayton was the shooter. Clayton's brain injury always impairs his day-to-day functioning. It does not always impair his ability to deliberate. Sometimes Clayton can exercise control and other times he cannot (PCRTr. 290-291). It is completely random (PCRTr. 290). If a signal in Clayton's brain can find a neurochemical pathway to a solution, he can make a good judgment response, but if the signal hits scar tissue, then it bounces back to his limbic system and the flight or fight response is triggered (PCRTr. 253, 290-291). It cannot be credibly argued that at all moments of his life he is incapable of cool

reflection, therefore he was incapable of cool reflection at the time he shot Castetter, if he in fact shot Castetter.

The only way to credibly assert the diminished capacity defense was to explain Clayton's state of mind at the time of the shooting and explain why the circumstances surrounding the shooting rendered him incapable of deliberation. Ever since his sawmill accident Clayton has been hypersensitive to stimuli, such as loud noises, which causes him to be very agitated and confused (Ex. 4 at p. 3, 12, 21, 23-24, 32, 47, 51). Thus, when Clayton was blinded by Castetter's headlights and his vehicle was sideswiped, Clayton's brain had a typically exaggerated response to the stimuli and perceived a threat (PCRTr. 367).

Not only do Respondent and the motion court refuse to acknowledge the obvious inconsistency in the defenses, but neither Respondent nor the motion court analyze the relative merits of the two defenses. The reasonable doubt defense and the diminished capacity defense did not share an equal likelihood of success. Respondent notes that counsel chose to pursue a reasonable doubt theory when he obtained gunshot residue evidence indicating that Cole tested positive and Clayton tested negative (Resp. Br. at 23). Respondent wrote, "Using his years of experience, Rhoades reasonably believed that the gunshot residue evidence was the type of evidence that could create reasonable doubt" (Resp. Br. at 28).

Respondent's argument is fatally flawed, because Respondent fails to evaluate the strength of the gunshot residue evidence in context of the other evidence presented at trial. It is true that Cole had gunshot residue on his left

hand, and Clayton did not have gunshot residue on his hands (Tr. 1389-1391, 1395, 1452). But Cole had an alibi that was corroborated by other witnesses. Clayton's truck was spotted at the crime scene at 9:57 p.m. (Tr. 1002-1003). Cole took his friend Rosemary Youngblood to work at 9:53 p.m. and then returned home (Tr. 1419-1420). The distance between Cole's house and the crime scene is 6.6 miles and and requires 9.5 minutes to drive (Tr. 1327). There is no way Cole could have made the trip in four minutes. There is no believable explanation as to how Cole could have been present at the crime scene in Clayton's truck.

Furthermore, the gunshot residue evidence is of minute significance when compared to the balance of incriminating evidence: 1) Clayton had a motive for being at the crime scene, and Cole did not; 2) Clayton was discovered trying to hide a .38 caliber gun containing four live rounds and one expended cartridge (Tr. 1219, 1344, 1353); 3) paint samples from Castetter's patrol car and Clayton's truck matched (Tr. 1379-1382); and 4) Clayton made incriminating statements to four people, and counsel had no persuasive means of contesting the veracity of the four people who heard the confessions (Tr. 1290-1291, 1432-1435, 1459-1461, 1482-1484).

The gunshot residue evidence was insignificant compared to the amount of evidence demonstrating that Clayton was the shooter. It was not reasonable for counsel to pursue the reasonable doubt defense on the basis of the gunshot residue evidence. Respondent argues, "It was not unreasonable for counsel to not only offer the jury a theory on which to convict appellant of a lesser-included offense

but to give the jury an opportunity to acquit appellant entirely by casting a bare suspicion on the state's case – enough of a suspicion to create reasonable doubt" (Resp. Br. at 29, emphasis in the original). As demonstrated by the evidence set forth in the above paragraph, there was never any chance that the jury would acquit Clayton. Presentation of the reasonable doubt theory did not give the jury the opportunity to acquit; it gave the jury reason to doubt counsel's credibility and undermined the diminished capacity defense.

Respondent elevates Rhoades' comment that "juries can hang up on the silliest damn things" to the level of reasonable trial strategy but dismisses his statement that he was inadequate and inept for refusing to accept that the likelihood of success in the guilt phase was minimal as engaging in hindsight review and disappointment at the death verdict (Resp. Br. 25, 29, 30). It does not require the perfect 20/20 vision of hindsight to realize the strength of the state's evidence demonstrating that Clayton was the shooter. Counsel never claimed he was blindsided at trial. He wasn't surprised by the physical evidence linking Clayton to the crime scene and the four confessions. He was aware of Cole's alibi. He should have known long before the trial started that the gunshot residue evidence was not substantial.

Respondent argues that defense counsel may present inconsistent defense theories without rendering ineffective assistance of counsel (Resp. Br. at 29). In support of this proposition, Respondent cites United States v. Jerome, 933 F.Supp. 989, 996 (D.Nev. 1996). The United States Court of Appeals, Ninth

Respondent also relies on Jones v. Kemp, 678 F.2d 929 (11th Cir. 1982) (Resp. Br. at 29). In Jones the defendant was convicted of theft by receiving stolen property. Id. Jones contended that his counsel was ineffective for not presenting evidence that he did not know the property was stolen. Id. In denying this claim, the court wrote, "The defect in this reasoning is that a defense of lack of knowledge that the pistol was stolen is arguably inconsistent with appellant's testimony that he never saw the gun, never touched it, never had it in his possession, and did not know it was in his car until he reached the police station. It was not ineffective assistance of counsel to emphasize the 'I don't know anything about it at all' defense at the expense of a defense that would admit knowing something about the pistol, but not that it was stolen." Id.

Jones does not endorse the presentation of inconsistent defenses. To the contrary, Jones recognizes the damage caused by inconsistent defenses and states that counsel cannot be faulted for refusing to present inconsistent defenses. Also see, Johnson v. State, 762 S.W.2d 484 (Mo. App. 1988)(counsel's decision to avoid inconsistent defenses was clearly an exercise of trial strategy).

Respondent also relies on United States v. Salameh, 54 F.Supp.2d 236 (S.D.N.Y. 1999). Salameh involved the trial of conspirators responsible for the bombing of the World Trade Center in 1993. Id. One of the conspirators, Ayyad, claimed that his counsel was ineffective, because he questioned witnesses with the purpose of showing possible alternative causes for the explosion (a transformer malfunction, residual gas from cars in the parking garage, etc.) rather than

conceding that a bomb caused the damage. Id. at 254. The court determined that counsel's attempt to create doubt was not unreasonable. Id.

Salameh does little to support Respondent's argument, because it is not factually on point. In Clayton's case, counsel argued that Clayton was innocent *and* that Clayton was guilty of second-degree murder. From the Salameh opinion, it does not appear that counsel argued that defendant Ayyad was both innocent and guilty. Ayyad's attorney merely asserted different theories of causation.

Respondent concludes its argument by asserting that Clayton did not prove prejudice from the presentation of the inconsistent defenses: "there was no evidence presented before the motion court to establish that but for counsel's decision to advance a reasonable doubt theory in the guilt phase of trial, the jury still would have accepted the diminished capacity evidence to the point where they would have found he could not deliberate or, in the penalty phase, sentence him to life" (Resp. Br. at 32). This statement is somewhat misleading. First, Clayton is only required to show a probability sufficient to undermine confidence in the outcome. Strickland v. Washington, 466 U.S. 668, 688 (1984). Second, if Respondent is suggesting that Clayton had to prove that the jurors would have accepted the diminished capacity defense, the statement is incorrect, because a post-conviction movant cannot call jurors to testify that their verdict would have been different. Amrine v. State, 785 S.W.2d 531, 535-536 (Mo. banc 1990).

Clayton was prejudiced by counsel's decision to pursue a reasonable doubt theory. A detailed statement of the prejudice caused by counsel's deficient

performance is contained in Clayton's original brief and will not be repeated here (App. Br. at 55-59).

Counsel's presentation of mutually exclusive, inconsistent defenses violated Clayton's rights to due process, effective assistance of counsel, and freedom from cruel and unusual punishment, under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution. This Court should reverse the judgment and remand this case for a new trial as to both phases. In the alternative, this Court should vacate Clayton's death sentence, and remand this case for a new penalty phase or impose a sentence of life without parole.

ARGUMENT II

The motion court clearly erred in denying Clayton's post-conviction motion, because the record leaves the firm conviction that a mistake has been made, in that counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise under the same or similar circumstances, in violation of Clayton's rights to due process, effective assistance of counsel, and freedom from cruel and unusual punishment, under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution, in that counsel did not thoroughly investigate and present the diminished capacity defense and the mitigation case based on Clayton's brain injury. Counsel failed to: 1) present evidence that Clayton had a history of head injuries and never had rehabilitation therapy; 2) use records from Nevada State hospital, Clayton's Social Security file, and Clayton's school and present anecdotal evidence from Carolyn Dorsey and Les Paul that would have shown Clayton sought help for his brain damage, the brain damage consistently affected Clayton's behavior since 1972, the brain damage was documented consistently since 1972, and all testing of Clayton was consistent since 1972; and 3) present a coherent theory as to why Clayton's brain damage prevented him from deliberating at the time of the shooting, which counsel could not do, because he prohibited his expert from discussing

the shooting with Clayton. There is a reasonable probability that Clayton would have been convicted of second-degree murder or at least sentenced to life without parole if counsel had presented this evidence.

Clayton asserts that counsel was ineffective in the guilt and penalty phases for failing to present all of the available evidence in support of the diminished capacity defense and the mitigation theory based on Clayton's brain injury. Counsel failed to utilize records documenting the effects of Clayton's brain injury on his behavior over a sixteen-year period.

Respondent claims that counsel strategically chose not to provide all of Clayton's Social Security records to the defense expert, Dr. Back, and chose not to use the records at trial, because he wanted to avoid a "paper war" and prevent the state from vigorously cross-examining Dr. Back with any inconsistent records (Resp. Br. 41, 43). This argument is incorrect.

Respondent overlooks the fact that counsel disclosed the entire Social Security file to the state before trial (PCRTr. 863-864; Ex. 33). Counsel gave records to the state that he did not disclose to his own expert. He did not immunize Dr. Back from vigorous cross-examination, but rather gave the state every opportunity to cross-examine Dr. Back about the Social Security records. Furthermore, if counsel specifically chose to provide Dr. Back with only the most helpful reports, then there is no strategic explanation for counsel's failure to provide her with Dr. Douglas Stevens' report of October 31, 1983, which included

extensive detail of Clayton's symptoms and test results from an MMPI and Halstead-Reitan battery (Ex. 4 at 2-5). Dr. Steven's report is not included in Exhibit 31, the materials sent to Dr. Back, yet the report contains a great deal of information helpful to the defense.

Respondent claims that portions of the Social Security records were inconsistent with Clayton's mental defense. From the many reports pertaining to Clayton's mental health history, Respondent cites to three examples of purported inconsistencies (Resp. Br. at 43-44). First, Respondent refers to the report of Dr. Jim Earls dated May 16, 1983 in which Dr. Earls wrote that Clayton was willing to endorse a wide variety of psychiatric symptoms of schizophrenia but could not describe the sensations (Resp. Br. at 43; Ex. 4 at 55).

Dr. Earls' report is not damaging to Clayton's case. The report states that Clayton has an organic disorder secondary to a brain injury and that he is not psychotic (Ex. 4 at 55). As Dr. Foster explained, this is consistent with Clayton's history as documented in the Social Security file (PCRTr. 299-300). Clayton is not psychotic, although he has symptoms that resemble hallucinations experienced by psychotic individuals (PCRTr. 300).

Dr. Earls' reluctance to accept the veracity of Clayton's description of symptoms is more a reflection on Dr. Earls' lack of attention to Clayton's case than it is a reflection on Clayton. Dr. Earls wrote, "He is a man with some unspecified form of emotional difficulties which led to his having a psychiatric hospitalization *prior to* a significant brain injury" (Ex. 4 at 55, emphasis added).

Clayton's only psychiatric hospitalization was in 1974 at the Nevada State Hospital, two years *after* the sawmill accident (Ex. 7). Dr. Earls, therefore, missed the crucial fact that Clayton did not exhibit psychiatric symptoms until after the brain injury. Dr. Earls correctly diagnosed Clayton as having an organic disorder, but he did not have a correct understanding of Clayton's history and therefore minimized the impact of the injury on Clayton's mental health.

Second, Respondent refers to the report of Dr. Clifford Whipple dated March 19, 1980 in which Dr. Whipple asserted that Clayton did not have confusion in his thought processes, had a good memory, and his test scores on the Memory for Design test did not indicate that Clayton suffered from an organic disturbance (Resp. Br. at 43-44; Ex. 4 at 13).

Both Dr. Back and Dr. Foster explained in detail how the test scores obtained by Dr. Whipple were completely consistent with their assessment of Clayton (PCRTr. 244-248; Ex. 1 at 37-38). This testimony is set forth in Clayton's original brief (App. Br. at 71-72, 81). Furthermore, it is important to understand that Dr. Whipple did not give Clayton the Halstead-Reitan battery which is "without question the most thoroughly documented and scientifically sound neuropsychological . . . assessment piece" that exists (PCRTr. 202). The Halstead-Reitan has withstood nearly sixty years of rigorous research (PCRTr. 202). Dr. Whipple did not assess Clayton with the most accurate test available.

Furthermore, it is interesting to note that although Respondent contends that Dr. Whipple's report was inconsistent and that counsel purposely did not send

ed. The mild organic damage done by the accident precludes his working through some of the pre-

> existing conflicts that relate to the current anxiety situation and his situation currently results in him being wildly phobic of individuals and work situations. It is possible that vocational rehabilitation for a job that would be a quiet, solitary kind of work, reasonably repetitive, and not require significant complicated interpersonal relations or a high level memory performance might be possible. His tangential kinds of thinking will make this also very difficult to sustain. In the opinion of this interviewer, Mr. Clayton is currently unemployable, is disabled, and very likely is permanently so disabled. (Ex. 4 at 52-53).

In his 1980 report, Dr. Eardley said that Clayton may have improved since 1978, but that improvement "may be only minimal" (Ex. 4 at 49). Dr. Eardley's report is neither inconsistent nor damaging as Respondent contends.

Respondent asserts that some of the material contained in the records would not have been admissible in a wholesale fashion, because the records contain hearsay (Resp. Br. at 45). Clayton is not suggesting that counsel should have simply moved to admit all of the records and then turned them over to the jury in the hope that the jury would read all of the records and glean for themselves the critical information. Clayton clearly argued that counsel should have integrated the records into the testimony of an expert witness (App. Br. at 80).

An expert witness is entitled to rely on hearsay evidence to support an opinion so long as that evidence is of the type reasonably relied upon by other

experts in that field, and such evidence need not be independently admissible. State v. Hendrix, 883 S.W.2d 935, 940 (Mo. App. 1994)(it was proper for non-treating doctor to testify that based on medical and police reports it was his opinion that the victims were sexually abused); State v. Rowe, 838 S.W.2d 103, 110 (Mo. App. 1992)(state was entitled to cross-examine defense expert about record prepared by a non-testifying doctor). It is not uncommon for a doctor to refer to another doctor's report when making a diagnosis. Rowe, at 110. A doctor testifying to a patient's health may be asked for the reasons for his conclusions either on direct examination, to show that his opinion is well founded, or on cross-examination to show that it is ill founded. State v. Cone, 3 S.W.3d 833, 844 (Mo. App. 1999).

Counsel's fear of a "paper war" was unreasonable. He should have used the records to show that the opinion of his expert was well founded. If the state's only ammunition was the reports of Dr. Eardley, Dr. Whipple, and Dr. Earls, the defense would have had no trouble winning the "paper war." This so called "paper war" would not have confused the jury. The jury needed to know Clayton's history. The jury needed to know that Clayton suffered the effects of the brain injury since the accident; he did not mysteriously begin suffering the effects of brain damage the night of the shooting.

Respondent claims the Nevada State hospital records would have been damaging to Clayton, because the records indicated that Clayton was not interested in school, before the accident people irritated him and he did not like

crowds, he had a reputation for drinking and fighting, and he had a high temper and was high strung since he was a teen (Resp. Br. at 49). It is ludicrous to suggest that the jury would have been more likely to convict or recommend a death sentence because the record says that Clayton was not interested in school and did not like crowds.

More importantly, Respondent's argument is incorrect, because this information would have actually furthered the mental defense. Frontal lobe injury exacerbates pre-existing personality traits (PCRTr. 304-305). Clayton, like other members of his family, is high-strung by nature (PCRTr. 37-38). That may not be a desirable personality trait, but it does not make him more deserving of the death penalty. After he suffered brain injury, his ability to cope and control his temper decreased. The fact that people irritate Clayton is simply a result of his social anxiety disorder. People have always made him nervous and following the accident this anxiety is even more pronounced.

Respondent asserts that Dr. Foster's testimony was very similar to Dr. Back's testimony, if the information from the Social Security records, Nevada State hospital records, school records, and lay witnesses is disregarded, thus counsel cannot be faulted for not presenting cumulative information (Resp. Br. at 59, 61-62). This argument is incorrect, because it rests on the faulty premise that Dr. Foster's testimony regarding the information from the Social Security records, Nevada State hospital records, school records, and lay witnesses should be disregarded.

Dr. Foster's testimony and Dr. Back's testimony were somewhat similar, in that they both correctly diagnosed Clayton as having dementia secondary to a head injury (PCRTr. 191; Tr. 1569-1570). The issue is not who is the better doctor; it is not a question of expert shopping. Both doctors arrived at the same conclusion. The issue is whether counsel's presentation of the diminished capacity defense and mitigation case was ineffective, because counsel failed to conduct the necessary investigation and provide Dr. Back with the information she needed to show the jury how Clayton's history clearly proves that his brain injury had a profound impact on his behavior.

Dr. Back's testimony showed that Clayton has a brain injury. But that does not decisively prove diminished capacity. The issue is what effect does his brain injury have on his behavior. Dr. Back could only answer that question based on general observations of how brain injured people behave. She had no specific information as to how Clayton behaved. Therefore, her testimony lacked credibility. As the state asserted at trial, Dr. Back only talked about test results and did not address the facts of the case (Tr. 1648).

Dr. Foster's testimony demonstrated how a more persuasive presentation could have been done by incorporating Clayton's history and evidence of his behavior after the brain injury into the expert's testimony, thus demonstrating a credible basis for the expert's opinion that Clayton could not coolly reflect at the time of the shooting.

Counsel's inadequate investigation and presentation in both phases violated Clayton's rights to due process, effective assistance of counsel, and freedom from cruel and unusual punishment, under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 18(a), and 21 of the Missouri Constitution. This Court should reverse the judgment of the motion court and remand this case for a new trial as to both phases. In the alternative, this Court should reverse the denial of post-conviction relief as to the penalty phase, vacate Clayton's death sentence, and remand this case for a new penalty phase or impose a sentence of life without parole.

CONCLUSION

Based on the foregoing arguments and the arguments in Clayton's original brief, on Points I and II, this Court should reverse the judgment and remand for a new trial, or in the alternative, vacate Clayton's sentence and remand for a new penalty phase or impose a sentence of life without parole. On Point III, this Court should reverse the judgment and remand for a new trial. On Point IV, this Court should reverse the judgment, vacate Clayton's sentence and remand for a new penalty phase or impose a sentence of life without parole.

Respectfully submitted,

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CERTIFCATE OF COMPLIANCE

I, Rebecca L. Kurz, hereby certify that:

The attached brief complies with the limitations contained in this Court's Special Rule 1(b). The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the brief contains _____ words, which does not exceed twenty-five percent of the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a copy of this brief. The disk has been scanned for viruses using McAfee Virus Scan program. According to that program, the disk is virus-free.

_____
REBECCA L. KURZ

CERTIFICATE OF MAILING

I, Rebecca L. Kurz, certify that on October 9, 2001, two true and correct copies of the Appellant's Brief and a floppy disk containing a copy of this brief were mailed to Adriane Dixon Crouse, Assistant Attorney General, Office of the Attorney General, 221 W. High Street, Broadway Bldg., 4th floor, Jefferson City, Missouri 65102.

_____
REBECCA L. KURZ